

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
-VS-	:	
The Peoples Gas Light and Coke Company	:	05-0341
	:	
Citation for alleged violation of Commission:	:	
rules regarding leakage surveys.	:	

ORDER

I. PROCEDURAL HISTORY

On June 2, 2005, the Illinois Commerce Commission ("Commission") entered an Order commencing this proceeding to determine whether the Peoples Gas Light and Coke Company ("Peoples Gas" or "Respondent") has failed to comply with the inspection requirement of 49 CFR § 192.723(b)(2) in that Peoples Gas has failed to conduct leakage surveys with leak detector equipment within the five year time span mandated by the federal rule incorporated as the Commission's rule, and to determine whether civil penalties should be imposed pursuant to Section 7 of the Illinois Gas Pipeline Safety Act.

The City of Chicago filed an appearance in this proceeding. A petition to intervene in this proceeding was filed by the Citizens Utility Board ("CUB"). The petition to intervene was granted by the Administrative Law Judge.

Pursuant to proper legal notice, an evidentiary hearing was held in this matter before a duly authorized Administrative Law Judge of the Commission on November 8, 2005. Appearances were entered by counsel on behalf of Peoples Gas and Commission Staff ("Staff"). Edward Doerk, Vice President Gas Operations, presented testimony and exhibits on behalf of Peoples Gas. Rex Evans, Pipeline Safety Program Manager of the Commission's Energy Division, presented testimony and exhibits on behalf of Staff. At the conclusion of the hearing on November 8, 2005, the record was marked "heard and taken," with leave granted to Peoples Gas to file a supplemental exhibit updating the data on leakage surveys performed.

Initial briefs and reply briefs were filed by Peoples Gas and Staff. A proposed Order was served on the parties on January 26, 2006. Peoples Gas and Staff filed briefs on exceptions and replies on exceptions.

II. The Applicable Legal Standards

The United States Department of Transportation has promulgated a rule, which the Commission has adopted by reference (83 Ill. Admin. Code Part 590): That rule reads in part:

Sec. 192.723 Distribution systems: Leakage surveys.

(a) Each operator of a distribution system shall conduct periodic leakage surveys in accordance with this section. ...

(b)(2) A leakage survey with leak detector equipment must be conducted outside business districts as frequently as necessary, but at least once every 5 calendar years at intervals not exceeding 63 months. . . .

49 C.F.R. §192.723.

The Illinois Gas Pipeline Safety Act ("Act") (220 ILCS 20/1 *et seq.*) requires the Commission to:

...adopt rules establishing minimum safety standards for the transportation of gas and for pipeline facilities. Such rules shall be at least as inclusive, as stringent, and compatible with, the minimum safety standards adopted by the Secretary of Transportation under the Federal Act.

220 ILCS 20/3. The Commission incorporated by reference the applicable federal rules in 1977 at 83 Ill. Adm. Code 590, "Minimum Safety Standards for Transportation of Gas and for Gas Pipeline Facilities" ("Part 590").

Section 7(a) of the Illinois Gas Pipeline Safety Act (the "Pipeline Act") makes local gas distribution companies subject to a civil penalty for violations of Section 6(a) of the Pipeline Act. Section 6(a)(1) requires compliance with safety standards. The amount of the civil penalty is \$100,000 per violation capped at \$1 million. 49 USC 60122(a)(1); 220 ILCS 20/7(a).

Section 7(b) of the Pipeline Act describes the criteria that the Commission must consider in determining whether to assess a civil penalty for a violation of the Pipeline Act. This section, in relevant part, states: "the Commission shall consider the appropriateness of the penalty to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after notification of a violation." 220 ILCS 20/7(b).

III. Uncontested Facts

Of the 503,614 service lines in Peoples Gas' territory, 364,970 involve inside meters with inside service pipe leading to these meters. (Staff Ex. 1.0 at 5.) The only

other Illinois utility with a significant number of inside meters is Nicor Gas, which has approximately 257,000 or nearly one-third fewer inside meters than Peoples Gas. (Tr. 41-42.)

To comply with Section 192.723(b)(2)'s requirement to perform inside safety inspections ("IS Is" or "inside leakage surveys"), Peoples Gas must gain access to the inside pipes. Access only can be obtained if Peoples Gas' customers consent to entry into their homes. (Resp. Ex. A at 3; Resp Ex. C at 3, 7.) In the absence of consent, Peoples Gas has no way of obtaining the access to the service pipes that is necessary to perform the ISIs. Peoples Gas faces this obstacle even though its rate schedule requires its customers to provide "free access to the premises of the customer for the purpose of...inspection of metering equipment, service pipe and all other equipment relating to the Company's service." (Peoples Gas' Schedule of Rates, Ill. C. C. No. 27, Second Revised Page No. 24).

Notice by Staff and Peoples Gas' Response

In December 1999, Peoples Gas first was informed of Staff's belief that Peoples Gas was not in compliance with Section 192.723(b)(2)'s requirements to perform ISIs. In a January 10, 2000 letter, Staff officially notified Peoples Gas of violation of Section 192.723(b)(2). (ICC Staff Ex. 1.0 at 5.)

In response to the January 10, 2000 notice letter, Peoples Gas submitted a proposal to Staff regarding the enhancement of its leakage survey program. This initial proposal, submitted by Peoples Gas on March 24, 2000, included a resolution by Peoples Gas that it would schedule and complete 75,000 ISIs each year to achieve compliance.

Peoples Gas presented evidence that it took action in response to Staff's notice of ~~apparent~~ noncompliance with Section 192.723(b)(2) beginning in 2000 and that Peoples Gas continued to modify its efforts to conduct ISIs over the course of time. Mr. Doerk testified that Peoples Gas since December 1999, Peoples Gas took the following efforts to perform the required ISIs:

In 2000, shortly after Staff first notified Peoples Gas about ISIs, Peoples Gas sought to combine its efforts to conduct ISIs with its installation of an automated meter reading ("AMR") system throughout the service territory. While on site to install the AMR system, Peoples Gas employees conducted any ISIs due or past due at those locations. This resulted in progress on ISI completions. (Resp. Ex. C at 3-4.)

During 2000, Peoples Gas also used a combination of cold calls and appointments in an attempt to conduct outstanding ISIs. If customers did not answer their doors when Peoples Gas employees made unscheduled visits to their premises (because the customers were not home or refused to come to the door), cards were left on the customers' doors directing them to call and schedule appointments. (*Id.* at 4.) A workforce of about 30 meter readers was assigned to this task. (*Id.*) In the last half of

2000, Peoples Gas also initiated a pilot test program of sending two non-threatening letters to customers requesting their cooperation in scheduling ISIs. This pilot test resulted in less than a 35% response rate from customers. (*Id.*) In 2000, 28,333 due and past due ISIs were performed. (*Id.*)

In 2001, Peoples Gas continued its two non-threatening letter mailing campaign to 27,000 customers, which resulted in approximately 17,000 responses. (*Id.*) Also, following discussions with Staff, Peoples Gas proposed a new three letter ISI program as part of a tariff revision filed with the Commission for its approval. The proposed tariff revision authorized Peoples Gas to discontinue service if access to complete an ISI was denied. (*Id.*) In 2001, 35,735 due and past due ISIs were performed. (*Id.* at 4-5.)

In 2002, Peoples Gas tried a new approach to ISIs. Specifically, Peoples Gas assigned about 300 regular field service crews to perform ISIs along with other customer service work. In addition, cold calls were attempted in square mile sweeps. Also, on February 2, 2002, the Commission approved Peoples Gas' application to disconnect service to customers who failed to provide access to their premises to perform ISIs. (Resp. Ex. A at 5.)

In 2002, therefore, Peoples Gas began using the three-letter campaign. The thrust of this campaign was to: (a) alert customers when Peoples Gas would be in their neighborhoods to complete ISIs, (b) schedule ISI appointments for customers not reached by cold calling, and (c) warn customers about the possibility of disconnection if they refused access to their premises. (*Id.* at 5-6; Resp. Ex. C at 5.) Despite these efforts, in 2002 the number of due and past due ISIs performed was 20,676. (Resp. Ex. C at 4-5.)

In 2003, Peoples Gas again modified its approach. Specifically, Peoples Gas consolidated meter changes, AMR installations and ISIs by square miles. Each square mile was cold called and a posting, including a telephone number to schedule an appointment, was left at each non-responding home. Peoples Gas also continued to use the three-letter campaign. The number of due and past due ISIs completed in 2003 rose to 25,165. (*Id.* at 5.)

Peoples Gas tried yet another approach in 2004 in which it overlaid ISIs with collection activity, consecutively estimated accounts, and meter changes. In addition, Peoples Gas continued to use cold calls, postings for appointment solicitation and the three-letter campaign. Further, Peoples Gas assigned regular field service crews to conduct meter changes and collection activity. It assigned its meter reading crews to work on ISIs and consecutively estimated accounts. To complete the project, approximately 30 full time employees and 22 temporary summer employees were assigned to meter reading crews. (*Id.* at 5-6.) In 2004, the number of completed due and past due ISIs increased to 52,297. (*Id.* at 6.)

In 2005, through a team of customer service, operational and communications personnel, Peoples Gas reorganized and developed new approaches to ISIs. For

example, one idea Peoples Gas implemented was putting notices on red disconnection paper to get customers' attention. Additionally, Peoples Gas used more extensive outreach efforts, including an ISI news article in its bill insert publication, a targeted ISI bill insert, and coordination with the City of Chicago Department on Aging to help reach seniors. Further, Peoples Gas instituted a four-phase communication program that included an ISI solicitation letter, two notices of risk of disconnection with live outbound calling, and a final notice of disconnection sent by certified mail. To accomplish these programs, Peoples Gas used a dedicated workforce of 21 Operations Apprentices with up to 50 additional field service employees, as needed. (*Id.* at 6-7; Resp. Ex. A at 4.)

In 2005, Peoples Gas also filed an application with the Commission requesting permission to assess a \$200 refundable penalty against customers who refused repeated requests for appointments to conduct ISIs. On August 25, 2005, however, the Commission rejected this application. (Resp. Ex. B at 4.)

As of December 4, 2005, Peoples Gas had completed 116,900 due and past due ISIs, and expected that by the end of the 2005 Calendar year, only (approximately) 10,000 ISIs would remain outstanding. (Resp. Ex. 1.)

Since January 2000, Peoples Gas met with Staff and apprised Staff of its progress and changes in its approach to performing ISIs. (Ex. A to Staff Ex. 1 at 2-3.) In a November 5, 2004 meeting with Staff, Peoples Gas stated that would not meet its compliance goals under its then existent methods for obtaining access to customers' homes to perform ISIs, and presented Staff with a new approach it began to follow in April, 2005. (*Id.* at 2.) In its May 20, 2005 report to the Commission, Staff stated that it concluded this new approach would not achieve compliance by January 2006 and was not sufficiently dissimilar from prior approaches to warrant further delays in formal proceedings. The Commission then issued the citation order initiating this proceeding on June 2, 2005.

In each year from 2000 through 2004, Peoples Gas failed to fulfill the 75,000 ISIs-per-year commitment. Instead Peoples Gas completed 20,755 inside leakage surveys in 2000; 45,883 leakage surveys in 2001; 36,521 leakage surveys in 2002; 44,434 inside leakage surveys in 2003, and 86,746 inside leakage surveys in 2004. (Staff Cross Ex. 1, Ex. A, p. 2) During the same time period, Peoples Gas was failing to complete, and thus rolling over, due and overdue inside leakage surveys at the rate of 65,754 in 2000, 60,217 in 2001, 60,282 in 2002, 68,936 in 2003, and 87,762 in 2004. (Staff Ex. 1.0, Ex. D) By year's end in 2005, Peoples Gas projected that it would have completed 116,900 due or past due inside leakage surveys. That would leave 10,000 outstanding overdue leakage surveys. (Peoples Gas IB, pp. 4 & 7)

It is uncontested that Peoples Gas is and has been in violation of Section 192.723(b)(2)'s ISI requirements since 1999. The only unresolved issue for the Commission is the amount of penalty to be imposed for the violations.

Staff and Peoples Gas agree that the assessment of any civil penalty imposed on Peoples Gas in this proceeding is governed by 220 ILCS 20/7(b). Section 20/7(b) provides that in determining the a penalty, the Commission should “consider the appropriateness of the penalty to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after notification of a violation.” *Id.*

The regulation requires that a leakage survey must be conducted outside business districts as frequently as necessary, but at least once every 5 calendar years at intervals not exceeding 63 months. It is uncontested that Peoples was in violation at the time of the December 1999/January 2000 notifications. Five years later, in January 2005, it still was far from compliance. At that time, Peoples was almost 88,000 inspections short of its goal.

The Gas Pipeline Safety Act provides that operators of pipeline facilities that operators of pipeline facilities who fail to comply with applicable safety standards established under the Act are subject to a civil penalty for each day that the violation persists. (220 ILCS 20/6) The maximum penalty is set at \$100,000 for each violation, and capped at \$1,000,000 for a related series of violations.

Peoples Gas and Staff agree that a \$1 million penalty would not be disproportionate given the size of Peoples Gas, which had a net utility operating income of \$58,682,020 in 2004 and ranks number 14 among natural gas distribution companies in the United States, in terms of numbers of customers and revenue. (Staff Ex. 1.0, p.6)

IV. Contested Issues

A. Compliance With Section 192.723(b)(2)

1. Staff’s Position

The safety regulation adopted by the United States Department of Transportation and by the Commission requires that “[a] leakage survey must be conducted outside business districts as frequently as necessary, but at least once every 5 calendar years at intervals not exceeding 63 months. . . .” As stated by Staff, Peoples Gas was in violation at the time of the December 1999/January 2000 notifications. Five years later, in January 2005, it still was far from compliance. During each of the intervening five years, Peoples Gas failed to meet the commitment it made to complete 75,000 inside leakage surveys annually. In January of 2005, Peoples Gas was almost 88,000 inspections short of its goal. By the end of the year 2005, Peoples Gas projected that it would still have 10,000 outstanding overdue leakage surveys. Staff concludes that Peoples Gas has been in violation of the regulation on an ongoing basis for six years, since January 2000.

Gravity of the Violation

Staff relies upon the magnitude of the harm that could be caused in the event that a gas leak caused a fire or explosion to determine that Peoples Gas' failure to complete the mandated inside leakage surveys was a grave offense. In assessing the seriousness of the offense, Staff notes that this violation has been ongoing for at least six years. Staff states that leakage surveys are critical to ensuring the safety and integrity of natural gas distribution systems. The surveys give the owners of natural gas facilities the opportunity to identify and take corrective action to address leaks which may otherwise go undetected or unrecognized. Staff asserts that gas leaks can cause fires and explosions causing loss of life or property.

Since January 2000, Peoples has found 2,688 leaks in residential inside leakage surveys. These leaks were discovered solely because of the mandated leak surveys. Gas company manuals indicate that gas concentrations in enclosed areas from 5 to 15 percent are highly explosive. Staff testified that the regulations require gas detection equipment sensitive enough to detect even small amounts of natural gas. One purpose of the requirement is to ensure that leaks that customers do not become aware of otherwise are discovered through leakage surveys. (Staff Ex. 2.0, pp. 3-4)

Staff states that Peoples Gas' arguments regarding the difficulty in detecting the leaks, i.e., the necessity to use sensitive equipment, and that most customers become aware of leaks independently of the inside safety inspections ignore the very concerns that the inside leakage survey requirement was adopted to prevent: leaks which are only detectable by sensitive equipment and leaks which are not recognized by a gas consumer. Staff states that Peoples Gas' characterization of the 2,688 leaks as "minor", disregards the indisputable fact that natural gas is a highly volatile substance and that the potential harm in question is an explosion, which, in a residence, would surely result in great loss of property and likely result in loss of life. Staff stresses that the potential harm is gigantic and unacceptable. Staff dismisses Peoples Gas' arguments that the failure to conduct the survey is "not an *actual* safety threat" but "a *potential* harm". (Peoples IB, pp. 14-15) Staff explains that the argument that Peoples Gas' disregard of the safety standards results in a minimal safety risk because it creates a potential harm rather than an actual safety threat ignores the nature of the subject matter.

Staff relies on Peoples Gas' Gas Service Department Manual ("Peoples Gas' Manual"), Section 11, which states *inter alia* "...any accumulation [of natural gas] must be considered hazardous" in support of its assessment of the seriousness of a gas leak.

Staff also quotes Section 11.4 Ten Rules of Gas Leak Safety ("Ten Rules") of Peoples' Gas Manual, to emphasize the dangerousness of gas leaks:

These rules have been developed to protect the customer and the employee from injury and possible damage to property. Employees should always be conscious of these rules when investigating a leak.

1. Never look for a gas leak with a match or open flame.

2. Don't smoke where gas is suspected of escaping.
 3. Make sure there are no sources of ignition.
 4. Ventilate premises and turn-off the gas supply to the leak.
 5. Do not knowingly leave a gas leak.
 6. There can be more than one leak.
 7. Gas can travel some distance in its escape from the source of the leak.
 8. A gas leak can be masked by other odors. Gas odorant can fade under unusual conditions.
 9. Trust your sense of smell, but also recognize its limitations.
 10. All flammable gases or liquids can be dangerous.
- (*Id.*, Section 11.4, p. 2)

Staff asserts that the concerns addressed in the Ten Rules apply equally to all leaks. It is irrelevant whether the leak is one for which Peoples Gas receives a customer complaint, or whether the leak is discovered by an employee on the premises for other work, or whether the leak is discovered during a safety survey. (See *Id.*, Section 11.2, p. 1)

As indicated in Peoples' Gas Service Department Manual: any accumulation of natural gas must be considered hazardous and leak investigation is one of the most important phases of gas service work. (See Staff Ex. 2.0, Ex. A, p. 1, Section 11.1)

Staff contends that because explosions and fires are predictable consequences of gas leaks and, loss of life or property are likely consequences of residential explosions and fires, any accumulation of natural gas must be considered hazardous. Staff thus concludes that Peoples Gas' failure to conduct the required inside leakage surveys at least every five years is a grave violation which could result in grim consequences.

Staff also asserts that Peoples Gas has failed to act responsibly and come into compliance with the inside leakage survey requirement within a reasonable timeframe. Staff states that it worked with Peoples Gas for a period of over 5 years before filing the Staff Report which resulted in the initiation of this proceeding. Staff concludes that by the time of Reply Briefs in this proceeding, Peoples Gas has allowed this potential harm to continue affecting tens of thousands of homes over a six year time span.

Absence of Good Faith

Staff argues that Peoples has not exhibited good faith in attempting to achieve compliance with the requirement to conduct inside leakage surveys. According to Section 7, the time period in which an entity's good faith is to be measured is the time "after notification of the violation." (220 ILCS 20/7(b)) Thus, Peoples' actions from January 2000, when it was notified of the violation, to the present must be considered in making a determination about Peoples' good faith.

Staff points out that the burden is upon Peoples to show that it acted in good faith to achieve compliance. Good faith is not defined in the Gas Pipeline Safety Act, or in the Public Utilities Act. Peoples has professed that it acted in good faith. But, the good faith analysis should look behind the statements Peoples made in this docket. Facts in the record in this docket provide sufficient information for the Commission to make a decision about whether or not Peoples acted in good faith.

It is uncontested that Peoples did not bring itself into compliance with the indoor leakage survey requirement in the almost five and a half years between the time Peoples was officially notified of the violation in January 2000 and the May 20, 2005 filing of a Staff Report which resulted in the initiation of this docket. In fact, at the November 8 evidentiary hearing of this matter, there were still over 16,500 residences where the leakage surveys had not yet been completed within an almost six year time frame. (Tr., p. 16)

In the year 2000, the year immediately following the notification that it was in violation of the requirement, Peoples completed 28,333 inside leakage surveys.¹ (Staff Ex. 1.0, Ex. D) Peoples had 69,780 inside leakage surveys which were past due that year. (*Id.*) An additional 24,307 inside leakage surveys came due in 2000. (*Id.*) In other words, in order to come into compliance with the requirement, Peoples would have had to complete over 94,000 leakage surveys in 2000. Peoples completed only 28,333 surveys (*Id.*), although that same year Peoples made the commitment to Staff that it would complete 75,000 inside leakage surveys per year. At the end of 2000, Peoples had completed only about 4,000 more inspections than came due.

There were 65,754 past due leakage surveys at the beginning of 2001. Another 30,198 surveys came due that year. In 2001, Peoples completed 35,735 inside leakage surveys or only about 5,000 more than the number of residences that came due to be inspected that year. (*Id.*)

At the end of 2001, 60,217 overdue leakage surveys were rolled over to 2002. In 2002, Peoples completed 20,676 surveys, or even fewer than the number of residences (20,741) that came due for surveys. (*Id.*) Sixty thousand two hundred eighty two overdue leakage surveys rolled over into 2003. Another 33,819 leakage surveys came due that year and, Peoples completed only 25,165 inspections. Thus at the end of 2003, Peoples was further behind (68,936) in conducting the surveys than it had been at the beginning of the year (60,282). (*Id.*)

Peoples entered the year 2004 with 68,936 past due leakage surveys. An additional 71,123 surveys came due that year. Although Peoples completed 52,297 inside leakage surveys, it ended the year with 87,762 over due leakage surveys, nearly twenty thousand more than the number with which it began the year. (*Id.*)

Thus, at the beginning of 2005, a full five years after Peoples had been notified that it was in violation of the inside leakage survey requirement, Peoples was further behind on completing leakage surveys than it had been when the notice was originally

sent in 2000. Another 43,021 leakage surveys came due in 2005. In the first quarter of 2005, as of April 3, Peoples had conducted only 9,895 leakage surveys. (*Id.*)

However, subsequent to the filing of the Staff Report and the initiation of this docket on June 2, 2005, Peoples began making great strides in completing the required inside surveys. As of August 18, 2005, Peoples had completed 70,000 inside leakage surveys. (Respondent's Ex. A, p. 5) On September 14, 2005, the Company estimated that it would have 20,000 overdue inside leakage surveys by the end of the year. (Respondent's Ex. B, p. 3) As discussed above, as of the November 8 evidentiary hearing, Peoples had slightly more than 16,500 overdue inside leakage surveys. The only apparent change in circumstances was the June, 2005 initiation of this proceeding. Staff argues that this leads to the conclusion that Peoples was not wholehearted in its attempts to complete leakage surveys until the Commission commenced an investigation and Peoples faced the prospect of a fine. In sum, the only conclusion that can be drawn from the record evidence is that rather than demonstrating good faith, over the past 5 years, 11 months Peoples has been dilatory in its attempt to achieve compliance with the inside leakage survey requirement.

The average of the annual leakage survey inspections, conducted by Peoples from 2000 through 2004, was only 32,441. (Staff Ex. 1.0, p. 5) In order to achieve normal compliance, Peoples would need to average around 60,000 inspections each year. Peoples had committed in 2000 to conducting 75,000 leakage survey inspections annually. In 1999, Peoples conducted 87,899 of the inspections. The 32,441 inspections they averaged during the 2000 through 2004 time frame does not even come close to meeting the federal requirement on a going forward basis, let alone the obligations to make the inspections for which they had fallen behind.

Staff argues that these facts lead to the conclusion that from January of 2000 through April of 2005, Peoples was not acting in good faith in attempting to achieve compliance with the inside leakage survey regulations. Had Peoples been acting in good faith, Peoples would have recognized after only completing 28,333 leakage surveys in 2000, rather than the promised 75,000, that it had to take more aggressive action towards completing the surveys in 2001. But, year after year Peoples failed to complete the number of surveys that reasonably would have been necessary to bring it into compliance with the regulation.

In 1999, prior to being notified of the violation, Peoples was able to complete 87,899 surveys. During the entire 5 year period that Peoples was on notice of the violation before this docket was initiated Peoples did not, in any one year, match the number of surveys completed in 1999. Not only did Peoples not demonstrate good faith in attempting to eliminate the survey backlog, it did less work in that area than it had done in the year prior to the initial violation notification. Peoples had the continuing opportunity, and duty, throughout the days, weeks, and months of each year from January 2000 through May 2005 to change its tactics regarding notifying customers of the necessity of allowing access for leakage surveys, and failed for that entire period to

demonstrate good faith. If anything, Staff argues, it demonstrated contempt for the obligation it had to care for the safety of the public and its customers.

2. Peoples Gas' Position

Gravity of the Violation

Peoples' witness stated that the safety risk posed by not performing ISIs in a timely fashion is limited by the fact that ISIs required by Section 192.723(b)(2) cover only the inside service piping owned by Peoples Gas, not all of the gas piping inside a customer's premises. In general, the inside service piping leading to the gas meter is less than three feet in length, whereas a premises typically contains many more feet of customer-owned piping downstream of the meter. (*Id.*) Thus, the ISIs cover only one small aspect of inside piping and address only a small portion of possible leak problems associated with inside piping. (*Id.*)

Mr. Doerk testified that in the past five years Peoples Gas has responded to more than 338,000 inside emergency calls from customers smelling natural gas in their homes. (Resp. Ex. B at 2.) Mr. Doerk testified that in contrast, in all of the ISIs conducted since January 2000, Peoples Gas has found evidence of gas leaks in less than 0.6% of those inspections; most of those were minor leaks detectable with instruments only. (*Id.*)

Further, Mr. Doerk testified that major leaks typically are not associated with inside service piping. Inside piping, as opposed to outside piping, generally is not exposed to corrosive elements. (Resp. Ex. C at 2.) He also testified that other safeguards provide year-round protection, such as the odorant added to natural gas that allows customers to detect gas even small gas leaks. (Resp. Ex. B at 2-3.)

Peoples Gas asserts states that of the hundreds of thousands of ISIs that Peoples Gas has performed since January 2000, evidence of gas leaks were found in less than 0.6%, and that most of those were minor, requiring detection by highly sensitive equipment. (Resp. Ex. B at 2.) Peoples Gas claims that because odorant is added to the gas, customers typically detect even small leaks by smell and call Peoples Gas' emergency number without the benefit of an ISI. Peoples Gas states that in the past five years, Peoples Gas has responded to over 338,000 such calls. (*Id.* at 2-3.) Peoples Gas argues that this undercuts Staff's suggestion that customers were placed in grave harm or jeopardy solely because Peoples Gas was unable to complete all of its outstanding ISIs is baseless.

Peoples Gas argues that consistent with the minimal safety risk if ISIs are not performed on Section 192.723(b)(2)'s timetable, at the hearing Staff witness Mr. Evans acknowledged that the failure to complete an ISI is not an *actual* safety threat; that a gas leak not discovered because an ISI was not performed is a *potential* harm. (See Tr. 45-48.) Peoples Gas claims that because of the limited possibility that the inside pipes

will be the cause of a gas leak and, if they are the customer likely will smell it, this potential harm is more theoretical than real.

Peoples Gas notes that, presumably in recognition of this limited risk, Mr. Evans testified that he does not recommend that Peoples Gas discontinue customers' service for failure to allow ISIs all year round, but rather, that he believes disconnection only should be used in the summer months. (Tr. 47-48.) Peoples Gas argues that Mr. Evans' recommendation demonstrates that the failure to perform an ISI is not an actual safety threat because if it were, he would recommend disconnection regardless of the time of year. (Tr. 45; see also 83 Ill. Admin. Code § 280.130(k) (allowing discontinuance of service at any time for reasons of safety or health).)

Peoples Gas claims, based on the testimony of its witness Mr. Doerk, an engineer with 27 years of experience in the gas industry, that leaks uncovered by ISIs present little risk to residents of buildings where leaks are found and ISIs do not significantly reduce customer risk to inside gas piping leaks. (Resp. Ex. C at 1-2.) Peoples Gas asserts that Mr. Doerk's view is supported by the two reported decisions from other jurisdictions that address inside inspections.

Peoples Gas states that at the hearing, Staff witness Mr. Evans expressed familiarity with a Michigan case where a utility sought a partial waiver of the Michigan Gas Safety Standards as they applied to the requirement concerning leakage surveys. Peoples Gas states that in that Michigan case, *In re Consumers Energy Company*, 2002 WL 31501335 (Mich. P.S.C.) September 16, 2002, the parties agreed that: (a) atmospheric corrosion leaks are not likely to occur where the atmosphere is not corrosive as is generally the case inside a residence, (b) if there are leaks as a result of atmospheric corrosion, those leaks usually start at microscopic pipe wall openings and are detectable at low enough levels to avoid risk to the public, and (c) the atmospheric corrosion rate is very low or non-existent for the portion of each service line between the inside wall of a residence and the meter location. As a result, the Michigan Public Service Commission granted the partial waiver, concluding that it was not inconsistent with gas pipeline safety. Peoples Gas asserts that this decision to grant the partial waiver is consistent with Peoples Gas' position that ISIs are not integral to pipeline safety.

Peoples Gas states that the other decision, from Massachusetts, also supports its position that the failure to comply precisely with Section 192.723(b)(2)'s timetable does not create an actual safety risk. Peoples Gas states that in *Re Revisions Regulations Governing the Procedures Relating to the Inactivation, Abandonment and Leakage Survey of Gas Service Lines*, 1994 WL 711411 (Mass. D.P.U.) September 29, 1994, the Massachusetts Department of Public Utilities (the "Department") raised issues concerning the practicality of compliance with state regulations involving, *inter alia*, residential leakage surveys. The Department noted that because many residences are vacant during business hours and customers' concerns for personal safety prevent calls after business hours, operators find inside portions of service lines inaccessible. As a

result, operators have found it difficult to establish a systematic cost-effective method to gain entry to residences to survey inside piping for leakage.

Peoples Gas states that based upon these practical problems, the Department recognized that insistence upon strict compliance with Section 192.723(b)(2) “may impose a burden on operators that is *not justified by any significant increment in safety.*” (Emphasis added). This recognition was based upon the Department’s understanding that: (a) most gas leaks in service lines occur in the segment located between the main and the outer surface of the building wall where the service line is more susceptible to corrosive elements, (b) most operators encounter little, if any, difficulty in complying with the leakage survey requirements for those outside segments, (c) the small segment of a service line in a structure generally does not appear to be appeared to the same corrosive elements, and (d) the remaining portion of piping, which is customer-owned, is not required by regulation to be leak surveyed unless a customer reports a leak.

Peoples Gas argues that based on the record evidence and the persuasive findings of the Michigan and Massachusetts public utility commissions, any harm or threat caused by Peoples Gas’ inability to complete ISIs under Section 192.723(b)(2)’s timetable is, at worst, minimal.

Peoples Gas also argues that requirement that operators of distribution systems perform ISIs is not found in the express language of Section 192.723(b)(2). Rather, this is a United States Department of Transportation (“DOT”) interpretation. These circumstances militate against imposing a substantial civil penalty.

Peoples Gas states that the term “leakage survey” is not defined in Section 192.723(b)(2) or elsewhere in 49 CFR Part 192,¹ nor has the Commission (through regulation or decision) or any Illinois court has defined the term. Peoples Gas further states DOT has stated that a leakage survey under Section 192.723(b)(2) requires inspection of inside pipes, although this statement was unsupported by citation of authority or substantive analysis.

Peoples Gas states that the Illinois Pipeline Safety Act requires the Commission to “adopt rules establishing the minimum safety standards for the transportation of gas and pipeline facilities,” which “rules shall be at least as inclusive, as stringent, and compatible with, the minimum standards required by the Secretary of Transportation under the Federal Act.” 220 ILCS 20/3. Peoples Gas states that through 83 Ill. Adm. Code 590.10, the Commission adopted the standards contained in 49 CFR Part 192 as its minimum safety standards. Peoples Gas asserts that in adopting the federal standards, neither the Illinois legislature nor the Commission defined the term “leakage survey” or addressed what the leakage survey contained in Section 192.723(b)(2) requires. Peoples Gas claims that Illinois’ adoption of the federal standards therefore added no clarity to the obligations of a distribution system’s operator under Section 192.723(b)(2).

¹ See 49 CFR §192.3 (Definitions).

Peoples Gas asserts that DOT addressed what a leakage survey under Section 192.723(b)(2) encompasses in the context of issuing a new rule (which is part of the current version of Section 192.723(b)(2)) that requires operators of distribution lines in residential districts to use leak detectors to carry out required leakage surveys. See 58 Fed. Reg. 54524 (Oct. 22, 1993). Peoples Gas states that prior to this rule change, some operators had used vegetation surveys, a less reliable method. Peoples Gas asserts that in discussing the comments of certain distribution operators that the new rule be limited to buried pipe, DOT stated, without substantive analysis or citation of authority, that “existing § 192.723(b)(2) requires leakage surveys on interior piping that is subject to [49 CFR] Part 192.” *Id.* at *4.

Peoples Gas argues that because the requirement for inside pipe inspections comes from a DOT interpretation, not the express language of Section 192.723(b)(2), these circumstances militates against the imposition of a substantial civil penalty. Peoples Gas states that a penal statute must be strictly construed and will not be extended “beyond [its] obvious or literal meaning,” *People ex rel. Ill. State Bd. of Election*, 105 Ill. App. 3d 509, 546, 434 N.E.2d 543, 546 (1st Dist. 1982), or “to embrace matters beyond its terms.” *Jackim v. CC-Lake, Inc.*, 2005 WL 3110574, *4 (1st Dist. 2005); *Molex v. Ill. Pollution Control Bd.*, 9 Ill. App. 3d 1032, 1033, 293 N.E.2d 731, 732 (1st Dist. 1973). Peoples Gas states that provisions are penal when they specify either the amount of the damages that can be awarded for violations or the formula by which the amount of the damages is to be calculated. *Sternic v. Hunter Properties, Inc.*, 344 Ill. App. 3d 915, 918, 801 N.E.2d 974, 976 (1st Dist. 2003); *Namur v. Habitat Co.*, 294 Ill. App. 3d 1007, 691 N.E.2d 782 (1st Dist. 1998). Peoples Gas asserts that these rules apply to statutes imposing civil penalties. See e.g., *Jackim*, 2005 WL 3110574, at 4 (discussing Security Deposit Interest Act, 756 ILCS 715/2).

Peoples Gas states that any violations of the Illinois Gas Pipeline Safety Act or any rule or order issued under that act are subject to a civil penalty not to exceed the maximum penalties under 49 U.S.C. §60122(a)(1). 220 ILCS 20/7. Peoples Gas further states that under that federal penalty provision, the maximum penalty is \$100,000 for each violation, with a maximum penalty for a related series of violations of \$1 million. Peoples Gas argues that as a result, Section 7(b) of the Illinois Gas Pipeline Safety Act is a penal statute, and thus should be strictly construed and not extended beyond its obvious meaning. Peoples Gas claims that Given Section 192.723(b)(2)’s lack of express language regarding the necessity of ISIs, a civil penalty would have to be imposed (through Section 7(b) of the Illinois Gas Pipeline Safety Act), based upon a DOT interpretation. According to Peoples Gas, this seems at odds with the strict construction afforded penal statutes.

Good Faith

Peoples Gas argues that it is at its customers’ mercy to allow access to complete ISIs, and thus, under these circumstances, it is impractical to expect a utility with significant numbers of inside meters and service piping, such as Peoples Gas, to be able to achieve 100% compliance with Section 192.723(b)(2). Peoples Gas asserts

that given the number of notices and attempts to obtain the cooperation of the 10,000 customers for whom ISIs will remain outstanding at the end of calendar year 2005, the only way that Peoples Gas could achieve complete compliance with Section 192.723(b)(2) would be to disconnect those customers' service. Peoples Gas claims that because, as Staff agrees, disconnections for ISI reasons alone should only be conducted during summer months, Peoples Gas could not achieve 100% compliance (through disconnections) prior to the Summer of 2006.

Peoples Gas further argues that Staff witness Mr. Evans' hearing testimony established that "compliance" with Section 192.723(b)(2) does not mean that 100% of all required ISIs have been performed because he admitted that a "satisfactory" mark checked on an evaluation form by Staff when conducting a review of a utility's records does not mean that the utility is 100% compliant with Section 192.723(b)(2). (Tr. 35-40.) Peoples Gas states that, for example, Staff may consider a utility compliant if it has set a reasonable schedule for meeting "minimum requirements" and complies with the schedule, or, alternatively, Staff and a utility may enter into a "compliance agreement" whereby Staff has agreed that something less than 100% compliance is satisfactory. (Tr. 36-37, 39.) Peoples Gas argues that this means the level of "compliance" required before a citation order, with exposure to penalties, is triggered does not appear clear cut.

Peoples Gas argues that it should be deemed to be in compliance with Section 192.723(b)(2). Peoples Gas states that to achieve this level of compliance, Peoples Gas had to resort to threats of disconnection, a step that, as a public utility, it was reluctant to take, in addition to the fact that there was objection to threatened disconnection and that disconnection only should be done in the summer months.

Peoples Gas asserts that the Citation was issued because Staff's May 20, 2005 Report predicted that (a) Peoples Gas would be further out of compliance at the beginning of 2006 than at the beginning of 2004 and (b) its goal of completing delinquent surveys by January, 2006 "appears to be unattainable and no goal they set at this point appears to be realistic or attainable."² Peoples Gas claims, however, that in calendar year 2005, Peoples Gas completed nearly 117,000 due and past ISIs, which was nearly 90% of the total ISIs due and past due.³ Peoples Gas argues that by completing these ISIs, Peoples Gas should be deemed in effective compliance with Section 192.723(b)(2) -- particularly since obtaining access to 100% of its customers is impossible.

Peoples Gas asserts that it ultimately achieved the results Staff desired and thus, the reasons for issuing the Citation no longer exist.

With respect to the meaning of "good faith," Peoples Gas relies on a more recent version of *Black's Law Dictionary* (the 8th Ed., published in 2004) to point out that the definition of "good faith" has a variety of meanings depending upon the context.

² Order at 2.

³ See Respondent Exhibit No. 1.

Peoples Gas notes that under Illinois law, a determination of good faith requires an inquiry as to motive, rather than results. See *Cohn v. Cohn*, 122 Ill. App. 3d 763, 766, 461 N.E.2d 1028, 1031 (2d Dist. 1984) (former husband's denial of petition for reduction of child support reversed where evidence showed he participated in strike in "good faith" to improve his standard of living, not to evade financial responsibility for his children's support). Peoples Gas asserts that this is consistent with the "good faith" requirement in the Illinois Pipeline Safety Act, 220 ILCS 20/7(b) (the "Act"), which does not focus upon results. Peoples Gas states that instead, the Act focuses upon the charged party's good faith "in attempting to achieve compliance."

Peoples Gas argues that the record shows that it made constant and earnest effort to comply with Section 192.723(b)(2) by refining and evolving its methods of gaining access to customers' premises and increasing its resources devoted to achieving this goal, and that this demonstrates good faith.

3. Staff's Response to Peoples' Legal arguments

Staff asserts that the two orders from other jurisdictions which Peoples Gas relies upon as being consistent with or supporting its position regarding the lack of gravity of harm of violating the leakage survey requirement are inapposite to the proceeding before the Commission.

First, Staff criticizes Peoples Gas' reliance upon a Michigan case, *In re Consumers Energy Company*, 2002 Mich. PSC Lexis 277, Case No. U-13156, September 16, 2002. Staff distinguishes the Michigan order because it was the result of a settlement agreement between the Company and the Michigan Public Service Commission ("MPSC") Staff. Staff explains that the order granted a partial waiver of the inside leakage survey requirement, and the MPSC instructed its Staff to notify the United States Department of Transportation's Office of Pipeline Safety ("USDOT") of the issuance of the order. Staff noted that interestingly, by letter of November 25, 2002, the USDOT notified the MPSC that it objected to the Michigan waiver and therefore the waiver was stayed. Subsequently, on May 4, 2004, the USDOT notified the MPSC that it concurred with the waiver contingent upon the MPSC's representations that the energy company was in the 3rd year of a ten year program to remove residential meters to outside locations and the work should be completed in 7 years. Staff points out that USDOT granted the waiver only based upon MPSC's statement that "[i]n ten years the problem will not exist if this operator... is allowed through this waiver to use its resources to solve the problem permanently".

Staff asserts that none of the facts of the Michigan case are present in this docket. Specifically, Staff states that there is no settlement agreement between Staff and Peoples Gas, and that Peoples Gas has not offered a program to permanently solve the inside leakage survey problem. Staff maintains that the facts in the Michigan case, where the Company worked cooperatively with the MPSC Staff to resolve the problem, are entirely different from the docket currently before the Commission. Staff explains that in this docket, there is a disagreement regarding both the gravity of the

harm of the violation and the good faith of Peoples Gas in curing the violation. Therefore, Staff concludes that Peoples Gas' citation to and reliance on the Michigan order should be disregarded.

Staff describes the other order relied upon by Peoples Gas as equally irrelevant. Staff explains that *Re Revisions Regulations Governing the Procedures Relating to the Inactivation, Abandonment and Leakage Survey of Gas Service Lines*, 1994 WL 711411 (Mass. D.P.U. 94-142) September 29, 1994, is an order which initiated a rulemaking to consider whether changes should be made to the leakage survey requirements in Massachusetts. Peoples Gas cites the concerns raised by the Massachusetts Department of Public Utilities ("DPU") regarding the leakage survey requirements. However, Staff asserts that in fact, the final order in the rulemaking concluded that the existing regulations governing the leakage surveys would remain in effect and unchanged. (1995 WL 125607 Mass. DPU 94-142, February 27, 1995, see attached Ex. D) Staff concludes that no weight should be given to the references to this order as it simply consists of the reasoning behind the *initiation* of a rulemaking where *no action was taken in the final order* in regards to the leakage survey rules.

Staff responded in its Brief on Exceptions to Peoples' argument that because the requirement for inside pipe inspections comes from a DOT interpretation, not the express language of Section 192.723(b)(2), this militates against the imposition of a substantial civil penalty ("the 'express language' argument"). Staff objects to the inclusion of this argument in Peoples' Reply Brief. Staff argues that if Peoples Gas wished to raise this argument, it should have been raised in its Initial Brief. In support of its position Staff states: that the argument is not responsive to any new argument raised in Staff's Initial Brief; that the issue of the imposition of penalties was raised in the Commission order which initiated this proceeding on June 2, 2005; and that Staff's position on the appropriate fine was clearly set forth in its Direct Testimony on August 18, 2005. Staff also stated that the timing of the argument served to preclude Staff from having an opportunity to respond. Staff contends that for these reasons the Commission should not consider the argument other than to note that the argument was made, but in an untimely manner and will not be considered.

Staff also provides a substantive response to the argument for the Commission's consideration in the event the Commission wishes to consider the argument despite its unfortunate timing.

Staff disputes Peoples Gas' contention that it is a "DOT interpretation rather than the express language of Section 192.723(b)(2) that requires that inside pipes must be inspected." (Peoples RB, p. 5) In response to Peoples Gas' statement that "... the term 'leakage survey' is not defined..." (Peoples RB, p. 4), Staff countered that both terms are easily found in a standard dictionary. Staff quoted one definition of survey:

Critical examination or inspection often of an official character for an implied or specified purpose: the action of ascertaining facts regarding conditions or the condition of something to provide exact information esp. to persons

responsible or interested... (Webster's Third New International Dictionary, p. 2302 (1976))

Thus Staff states that it reads this argument as directed at the mandate that inside pipes must be inspected. On its face, Section 192.723 requires that each operator of a distribution system shall conduct periodic leakage surveys. Distribution lines are integral parts of a distribution system, thus they are subject to the leakage survey requirements. The question that Peoples Gas raises in its 'express language' argument then is whether interior piping is included within the distribution line and therefore falls within the leakage survey mandate. Staff quotes its direct testimony:

Gas pipeline operators are responsible for leakage surveys which are conducted on all distribution lines. This includes the service lines extending from distribution service mains to individual pressure regulators and meters on customer premises. The jurisdiction of gas pipeline operators ends at the outlet of a customer gas meter. (Staff Ex. 1.0, pp. 3-4)

Staff points out that Peoples Gas did not dispute this testimony.

Staff asserts that a review of Part 192 provides the basis for Staff's testimony. Staff references the definition of service line in Section 192.3:

a distribution line that transports gas from a common source of supply to an individual customer.... served through a meter header or manifold. A service line ends at the outlet of the customer meter or at the connection to a customer's piping, whichever is further downstream, or at the connection to customer piping if there is no meter. 49 CFR §192.3

According to Staff, this definition clarifies that the service line is a part of the distribution line and therefore included with the leakage survey mandate. Staff contends that the requirement to complete leakage surveys is not based upon the interior or exterior location of the service line, but upon whether it is part of the distribution line for which the Company is responsibility. This is consistent with the position that Staff and the Company (See Tr., pp. 23-24) took in this docket.

Staff continues to analyze Peoples Gas' argument by stating that the fact that the statement that "existing § 192.723(b)(2) requires leakage surveys on interior piping that is subject to part 192" (Peoples RB, p. 5) was made without analysis or citation of authority in the rulemaking proceeding, is not surprising. According to Staff, it was a statement of fact and not a contested issue in the proceeding. Staff explains that of the 56 organizations that filed comments, the only indication that inside surveys were an issue was the statement that 3 distribution operators suggested the final rule be limited to buried pipe. Even in that instance there is no indication that they argued that inside leakage surveys were unnecessary. According to the synopsis, they stated that leaks inside buildings are readily detectable without gas detectors. Thus, Staff explains, they were not contesting whether the rule as then written required that inside leakage

surveys be conducted. The order states that they were requesting a limit to the final rule. It is not clear whether the limit referenced was to the requirement for gas detectors for inside surveys or to the requirement for inside surveys themselves. In any event, Staff asserts, the suggestion was not adopted.

Staff goes on to assert that while the rulemaking at 58 Fed. Reg. 54524 does not support Peoples' argument; it does support Staff's position regarding the serious nature of the violation. Staff explains that according to the background information provided, the rulemaking was initiated due, in part, to a string of accidents over a 7-month period in 1988 and 1989, during which four persons were killed and 16 people were injured. The property damage exceeded \$740,000 from these accidents.

Staff concludes that Peoples' argument that Section 192.723(b)(2) does not contain express language regarding the inside leakage survey requirement should be disregarded. Staff states that the argument should be disregarded on a procedural basis because it was not made on a timely basis at the Initial Brief stage of this docket. Alternatively, Staff states that the argument should be disregarded on substantive grounds because Section 192.723(b)(2) when read in conjunction with the remainder of Part 192 clearly expresses the requirement that inside leakage surveys must be conducted on distribution lines, which include service lines ending at the outlet of the customer meter, at least once every five years.

C. Fairness

Peoples Position

In arguing against the imposition of a civil penalty in this proceeding, Peoples Gas also argues that it would be unfair to impose the maximum \$1 million civil penalty against Peoples Gas because of the unprecedented nature of this proceeding. Peoples Gas relies on the testimony of Staff witness Mr. Evans that "there is no precedent for violations of this nature." (Tr. 41-42; ICC Staff Ex. 1.0 at 7)

Peoples Gas also relies on *Central Illinois Light Company*, Docket 94-0040, 158 P.U.R.4th 1, 1994 WL 747589 (Ill. C.C.), a Central Illinois Light Company ("CILCO") rate case, in which the evidence showed that the company engaged in a systematic course of conduct intended to underreport the number and severity of gas leaks occurring on a cast iron distribution system. Peoples Gas states that the Commission found that CILCO's conduct was a substantial threat to public safety and made an adjustment to CILCO's rate base. Peoples Gas asserts that unlike the present case, Staff never issued a citation order or sought a monetary civil penalty from CILCO based upon its course of conduct that was far more egregious than that at issue here.

Peoples Gas further states that the Commission never has imposed a civil penalty under Section 192.723(b)(2) based upon a utility's failure to conduct the requisite number of ISIs. Peoples Gas asserts that as a result, the Commission never has opined upon the circumstances under which a penalty should be imposed or how a penalty should be calculated.

Peoples Gas argues that the maximum penalty of \$1 million is unnecessary because Peoples Gas now essentially is compliant with Section 192.723(b)(2), and to achieve this level of compliance, Peoples Gas had to resort to threats of disconnection, a step that, as a public utility, it was reluctant to take. Peoples Gas further argues that the maximum \$1 million penalty sought by Staff is excessive because it far outweighs any minimal safety concern. Peoples Gas asserts that under these circumstances, the imposition of the \$1 million maximum, or any substantial penalty, would be purely punitive and inconsistent with a more reasoned approach to civil penalties, which is as a tool to achieve compliance – not as a punishment after compliance has been achieved.

Staff's Response

Staff argues that the policy considerations to be considered are: 1) the six year period in which Peoples has been out of compliance; 2) the indifference exhibited by Peoples in coming into compliance; 3) the tens of thousands of households at potential risk; and 4) the potential harm from undetected leaks.

Staff acknowledges that the Commission has not imposed previously fines for this violation. There is nonetheless, precedent for imposing fines for violations of the Pipeline Safety Act. In 1989 in Docket 9-0475, as part of a settlement agreement, IP agreed to pay \$6000 for violations of the Act, the maximum allowed for the violations. In Docket 93-0127, the Commission imposed fines of \$54,000 against Monarch Gas Company for a series of violations. Monarch was a tiny company with low six figure operating income in each of the years in question. In Docket 90-0362 CILCO was cited for failing to pressure test lines on ten occasions, resulting in an explosion. As part of a settlement, CILCO agreed to pay the maximum penalty that at the time was \$10,000.

Staff also argues that Peoples reliance on Commission action in Docket 94-0040 is misplaced. The Commission found that CILCO's conduct was a threat to public safety, reduced its rate base by \$7,065,000 and reduced its depreciation expense by \$310,000. The Commission did not issue a citation order because those issues were addressed in a U.S. District Court case that resulted in CILCO paying more than \$1,000,000 in fines and investigation costs and accepting a \$4.8 million disallowance in a pending rate case.

According to Staff the only exceptional characteristic of this proceeding "is Peoples aplomb in refusing to comply with the safety standards that it is the Commission's duty to enforce." Staff contends that the Commission has taken a firm stance in regard to minimum safety standards. Appropriate fines have a deterrent effect. It is appropriate to impose one here where People's continues to deny the serious nature of the offense six years after notification.

Staff states that the Commission has historically taken very seriously the authority delegated to it by the legislature to establish and enforce compliance with minimum safety standards for the transportation of gas and for pipeline facilities. Staff noted that with the exception of the small company, Monarch, in each of the previous

penalty proceedings the Commission imposed the maximum penalty. Staff also referenced language in the previous orders where the Commission recognized the deterrent effect that penalties can have upon future violations either by the entity being fined or by other entities which may find themselves in similar situations in the future. Staff asserts that the small number of prior penalty cases identified by Staff is testament to the effectiveness with which the Commission has wielded the enforcement tools provided by the legislature.

Staff emphasizes that a penalty is particularly appropriate in the matter at hand where Peoples Gas, far from voluntarily coming into compliance or quickly implementing new policies to ensure compliance in the future, continues to deny the serious nature of the offense and states that “100% compliance is impractical”. Staff notes that Peoples Gas continues to take this position, six years after having been notified that it is in violation of the minimum federal and state safety regulations although it has not requested a waiver of the regulations. Staff theorizes that Peoples is of the view that compliance with the minimum safety standards is optional.

Staff recommends that the Commission assess a maximum penalty of \$1 million against Peoples Gas in this proceeding, based on a \$20 penalty for each meter that was past due for a leakage survey as of January 1, 2005. (Staff Ex. 1.0) Because this calculation exceeds the \$1 million maximum penalty that may be assessed, Staff did not calculate the penalty which would be imposed if each day the violation existed was counted as a separate violation as provided for in the Act at Section 7. Staff asserts that the penalty may be calculated in any number of ways. But given the number, the protracted duration, the ongoing nature, and the gravity of the violations, Staff argues that it is difficult to conceive of a calculation method that would result in a penalty of less than \$1 million. In any event, Staff concludes that, the number, the duration, the ongoing nature, and the gravity of the violations, make it clear that it is necessary to send Peoples Gas a clear message that the Commission will not tolerate disregard for safety regulations.

3. Commission’s Conclusion

The Commission finds that Peoples Gas was out of compliance with the requirements to perform ISIs under 49 C.F.R. 192.723(b)(2) at the time Staff issued its notice in January 2000, and that this state of noncompliance continues. The Commission recognizes, however, that Peoples Gas’ or any gas utility’s full compliance with this requirement is dependent upon access being allowed when meters and service pipes are located inside customers’ residences. The Commission finds that Peoples gas has been in violation of 83 Ill. Adm. Code 590.10 since January 10, 2000.

Unfortunately, the record shows that it took Peoples six years to come reasonably close to what it should have accomplished before 2000. Moreover, it is patent that Peoples more strenuous efforts to belatedly come into compliance only began after the commencement of this citation proceeding more than five years after receiving notification of the violation.

Under 220 ILCS 20/7, violations of 49 C.F.R. §192.723(b)(2) are subject to a civil penalty of up to \$100,000, with a maximum civil penalty of \$1,000,000 for a series of related violations. Here, Staff has recommended that a maximum penalty of \$1 million be imposed.

In determining whether to assess a civil penalty and if so, the amount of the penalty under 220 ILCS 20/7, the Commission must weigh the three factors: the appropriateness of the penalty to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after notification of a violation. 220 ILCS 20/7(b).

The Commission agrees with Staff and Peoples Gas that given the size of Peoples Gas, the maximum penalty here would not be inappropriate or disproportionate.

In looking at the gravity of the harm, the Commission agrees with Staff that ISIs are an important component of safety for a gas distribution system. The Commission also agrees that while ISIs are only one component of maintaining a safe distribution system, and cover a limited portion of inside piping, the consequences of any gas leak that goes undetected could be very serious.

Staff's argument regarding good faith focuses upon the numbers of due and past due ISIs Peoples Gas completed annually from 2000, and asks the Commission to imply from those results that Peoples Gas was not acting in good faith to meet the requirements of 49 C.F.R. §192.723(b)(2). The standard set forth in 220 ILCS 20/7(b) requires the Commission to consider in determining good faith, the "attempt" of a utility to achieve compliance. The record shows that Peoples failed abysmally to meet its goal of 75,000 inspections during five of the six years following its receipt of the notification that it was in violation. Only after this proceeding was initiated in its sixth year of non-compliance, did Peoples ramp up its efforts enough to get close to compliance.

On the other hand, Peoples Gas had to rely upon its customers to grant it access to the meters and service pipes located in their residences. Peoples Gas presented substantial testimony as to the efforts it made to overcome this obstacle in an attempt to perform ISIs, and that when it encountered poor results from those efforts, Peoples Gas modified its methods with (until the filing of this proceeding) not much success, in an effort to find an approach that would work. In its Reply Brief, Peoples Gas has also raised questions regarding whether the express language of 49 C.F.R. §192.723(b)(2) requires the inspection of inside pipes and the propriety of imposing a civil penalty under those circumstances. Staff objected to the timing of the express language argument. Staff also presented citations to the regulations which provide support for the inside leakage survey requirement. The bottom line is that the Commission considers compliance with minimum safety standards to be of paramount importance. Weighing all of the evidence and the appropriate factors under 220 ILCS 20/7(b), the Commission finds that although the maximum penalty may not be appropriate, a substantial penalty

is warranted for Peoples Gas' long term noncompliance with 49 C.F.R. §192.723(b)(2). We find that a penalty of \$500,000, which is \$100,000 for each year of substantial non-compliance is appropriate.

V. Findings and Ordering Paragraphs

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

- (1) Peoples Gas is engaged in the business of furnishing gas service to the public in the State of Illinois, and is subject to the Illinois Pipeline Safety Act;
- (2) the Commission has jurisdiction over Peoples Gas and the subject matter herein;
- (3) the findings of fact and conclusions of law set forth in the prefatory portion of this Order are supported by the record herein and are hereby adopted as findings of fact and conclusions of law;
- (4) the evidence shows that Peoples Gas failed to comply with the requirements of 49 C.F.R. §192.723(b)(2) in 2000, 2001, 2002, 2003, and 2004;
- (5) the evidence shows that at the end of calendar year 2004, five years after it was notified it was in violation, Peoples Gas had still failed to perform 87,762 inspections, or approximately 30% of the total ISIs required to reach substantial compliance with 49 C.F.R. §192.723(b)(2);
- (6) only at the end of 2005, after the filing of this citation proceeding, did the total number of inside safety inspections reasonably approach compliance;
- (7) Peoples Gas has not achieved 100% compliance with the minimum safety requirements and should make every effort to complete all overdue inside leakage survey in the immediate future;
- (8) in light of all of the circumstances a civil penalty of \$500,000 is warranted under 220 ILCS 20/7.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

IT IS THEREFORE ORDERED that Peoples Gas shall proceed with due haste to complete the currently overdue inside leakage surveys as required by the minimum

safety standards for the transportation of gas and for gas pipeline facilities found at 83 Ill. Adm. Code 590.10 which adopts 49 CFR 192.723(b)(2).

IT IS THEREFORE ORDERED that this matter shall be referred to the Attorney General of the State of Illinois to recover penalties pursuant to Section 7(c) of the Illinois Pipeline Safety Act.

By Order of the Commission this 22nd day of March, 2006.

(SIGNED) CHARLES E. BOX

Chairman